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Supreme Court, U.S.
FILED
081147 MAR 3 - 2009
OFFICE OF THE CLERK

No. 08-

IN THE
Supreme Court of the United States

PAUL S. GIRAGOSIAN,

Petitioner,

v.

FREDERICK RYAN and TOWN OF ARLINGTON, MA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEAN CARNAHAN
LAW OFFICES OF DEAN CARNAHAN
51 Newcomb Street
Arlington, MA 02474
(781) 641-2825

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the petitioner's 42 U.S.C. § 1983 claims filed in federal court are barred by claim preclusion as a result of a state court action and judgment.

2. Whether the Massachusetts statutory Provisions provide jurisdiction to a Massachusetts state district court for a 42 U.S.C. § 1983 claim with a petition for judicial review of licensing authority's decision to revoke or forfeit licenses.

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PETITION FOR WRIT OF CERTIORARI

Paul S. Giragosian ("Giragosian") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the First Circuit Court of Appeals, dated November 10, 2008, is officially reported at 547 F. 3d 59 (1st Cir. 2008) and is reproduced at App. A, 1a-13a. Giragosian filed a timely petition for a panel rehearing that was denied on December 3, 2008, which denial judgment is reproduced at App.35a.

The decision of the District Court of Massachusetts consists of a report and recommendation of a magistrate judge and an order and judgment of the district court judge and are reproduced at App. 15a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty

or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction of thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at Law . . .

The provisions of Massachusetts General Laws, Chapter 140, §§ 122, 122B, 125 and 131 are lengthy and are set out in App. 36a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Petitioner Paul Giragosian was a well-respected, sole owner of a gun

shop in Arlington, Massachusetts for thirty-one years. On January 24, 2007, Giragosian was training a customer firing at targets. The trainee suddenly pointed his handgun at his right temple and shot himself. Giragosian was standing to the left of the trainee and the bullet grazed Giragosians's cheek. The trainee died of his self-inflicted wound.

The Arlington Police Department completed their report on the same day and exonerated Giragosian from any wrongdoing. On January 25, 2008, Respondent Police Chief Ryan, ignoring his own police department's report, sent letters to Giragosian suspending Giragosian's licenses pending investigations by the Arlington Police Department and the Middlesex County District Attorney's Office.

Giragosian filed an action in Cambridge District Court challenging the suspensions of his licenses. At the hearing, on March 12, 2007, it became apparent that the

investigations of the Arlington Police Department and the Middlesex District Attorney's Office had completed and the judge ordered Ryan to restore Giragosian's license. Ryan was upset and told the judge that he would be back. The judge told Ryan to use the same witnesses and documents he had on that day for the next appearance in court.

Ryan refused to restore Giragosian's licenses and sent Giragosian letters revoking and forfeiting all of Giragosian's licenses. Ryan listed several reasons for his revocations and forteitures, including allegations that Giragosian (1) failed to report stolen firearms;[1] (2) failed to undergo a firearms safety instructor course mandated

[1] Giragosian reported that 40 firearms were stolen and neglected to report 3 that were stolen. The ATF investigator asked Giragosian to supplement his list of stolen handguns and he did so. Giragosian initially failed to include all of the handguns stolen since the burglary occurred when Giragosian was on vacation and he had to hastily prepare his list of handguns stolen. This burglary occurred because his burglar alarm system did not report the break-in. Giragosian obtained a judgment against the burglar alarm company for its negligence in causing the burglar alarm system failure and the loss of the handguns.

by Ryan following a customer suicide in 2002;[2] and (3) violated various state and federal laws found during an ATF investigation requested by Ryan.[3] The ATF report alleged that Giragosian (1) manufactured ten firearms without a manufacturing license;[4] (2) failed to contact the FBI for a background check prior to the sale of six firearms;[5] (3) failed to report the sale of multiple handguns to three

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[2] Giragosian did take the safety instructor course. The 2002 suicide occurred after Giragosian had trained the individual and Ryan had refused the give the individual a license after he learned that the individual was suicidal. Ryan neglected to inform Giragosian of these facts. When this individual appeared at Giragosian's shop, Giragosian gave him a handgun for target practice and the individual shot himself. Obviously, Giragosian would not have given this individual a handgun if Giragosian had known that the individual was suicidal.

[3] This warrantless search by the ATF investigator violated ATF regulations and violated Giragosian's constitutional rights.

[4] Giragosian did not manufacture any firearms and was not required to obtain a manufacturing license under the provision of 18 U.S.C. § 921(a)(21)(B).

[5] Giragosian had no duty to obtain FBI NCIS checks for these transfers of six guns to six Arlington Police Officers under federal and state laws.

individuals;[6] and (4) failed to properly document the gun shop's and Giragosian's personal inventory of firearms.[7] Ryan had all of these grounds when he initially suspended Giragosian's licenses.

On April 16, 2007, Giragosian filed his federal complaint, stating 42 U.S.C. § 1983 claims against Ryan and the Town of Arlington. On the next day, Giragosian filed a petition for judicial review of Ryan's forfeiture decision in Cambridge District Court, since the applicable statute required filing within thirty days of the forfeiture letters.

On May 17, 2007, Giragosian filed a motion for a temporary restraining order in federal court seeking to enjoin the justices of Cambridge District Court from conducting any

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[6] Giragosian admitted that this was an oversight. The ATF investigator told Giragosian to correct the entries in his books and he did so.

[7] The ATF investigator told Giragosian to make the correct entries in his books and he did so.

hearing until the federal court accepted jurisdiction and heard his appeal of the license forfeitures. This motion was denied.

At the subsequent hearing, the Cambridge District Court judge sided with Ryan and upheld the forfeiture of Giragosian's licenses, driving him out of business.

In the federal case, respondents filed a motion to dismiss Giragosian's case pursuant to Rule 12(b)(6). Following a report and recommendation of a magistrate judge[8], the federal district court entered a judgment dismissing Giragosian's claims. Giragosian appealed the judgment of the district court judge.

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[8] The magistrate judge's report and recommendation was based on allegations in Giragosian's federal Complaint that Ryan did not have any reasonable grounds for the revocation and forfeiture of Giragosian's licenses and that Ryan's actions were arbitrary, capricious or an abuse of discretion and that this issues had been decided in state court action. However, Giragosian only included these allegations in his federal Complaint because he wanted the federal court to exercise its pendent jurisdiction to hear his challenges to Ryan's revocations and forfeitures since he knew that he could not obtain a fair and impartial hearing at Cambridge District Court.

On appeal, the First Circuit affirmed the judgment of the district court on different grounds, holding that Giragosian's § 1983 claims in his federal complaint were barred by claim preclusion.[9]

REASONS FOR ALLOWANCE OR WRIT

The First Circuit's ruling that Giragosian's § 1983 claims were barred by claim preclusion was based upon a misunderstanding of the facts and reasons as to why Giragosian filed his federal action and also filed an action in Cambridge District Court. The First Circuit erred in ruling, under the facts and circumstances of this case, that claim preclusion would bar Giragosian's § 1983 claims in his federal complaint. Giragosian did not have the opportunity or incentive to file his § 1983 claims in the state court proceeding.

In ruling that Giragosian could have filed his § 1983 claims in his

[9] The First Circuit did not address the issue of whether Giragosian's federal complaint had failed to state a cause of action under the Fourth or Fourteenth Amendments.

Circuit ignored that the Massachusetts statutory provisions governing Giragosian's licenses do not provide that a § 1983 action for damages could be added to a petition for judicial review of a licensing forfeiture. More importantly, one of the statutory provisions does not provide any remedy for challenging a forfeiture of a license to sell firearms and a license to carry on business as a gunsmith. The failure to provide a remedy is a denial of due process, violating the Fourteenth Amendment and rendering the Massachusetts statute unconstitutional.

The First Circuit has decided an important question of federal law that has not been, but should be, decided by this Court. In addition, the First Circuit decision decided an important federal question in a way that conflicts with a decision by a state court of last resort.

I. REVIEW IS WARRANTED SINCE THE FIRST CIRCUIT'S DECISION IGNORED MASSACHUSETTS CASE LAW REGARDING CLAIM PRECLUSION.

The First Circuit looked at Massachusetts law to determine the preclusive effect of the state court judgment. In doing so, the First Circuit discussed the case of *Kobrin v. Bd. Of Registration in Med.*, 832 N.E. 2d 628, 634 (Mass. 2005). However, the *Kobrin* case held that claim preclusion would not apply when a litigant does not have the opportunity to litigate his claims in another proceeding. *Id.* The *Kobrin* case also held that before precluding a party from relitigating an issue, a court must determine that (1) there was a final judgment; (2) the party against whom preclusion is asserted was a party in the other litigation; and (3) that the issue in the prior adjudication was identical to the issue in the current litigation. *Id. (emphasis supplied.)*

In the *Kobrin* case, the court stated that claim preclusion would

not apply since the board could not have previously litigated the issue or disciplined the doctor since his conviction has not yet occurred. *Id.* at 635. Similarly, Giragosian could not have litigated the statement of Ryan that he had been trying to run Giragosian out of business for years since he was unaware of this statement when the state court action was proceeding.

The *Kobrin* case held that claim preclusion makes a final judgment conclusive on the parties and prevents relitigation of all matters that were or could have been adjudicated in the other action. *Id.* Ryan's statement and the effect of this statement was not adjudicated and could not have been adjudicated in the state court proceeding. In addition, as shown below, the Massachusetts statutes do not provide for the opportunity to litigate a § 1983 claim with a petition challenging the revocation or forfeiture of firearm licenses.

Thus, the First Circuit decided an important federal question (the preclusive effect of a state court

judgment on a federal statutory claim) in a way that conflicts with the *Kobrin* court holdings decided by the Massachusetts court of last resort.

The First Circuit overlooked the fact that this statement by Ryan shows that Ryan was on a personal vendetta to close Giragosian's business. In addition, this statement by Ryan is strong evidence that Ryan intentionally violated Giragosian's Fourth and Fourteenth Amendment rights. At any rate, Giragosian did not have the opportunity to fully litigate his § 1983 claim in state court since he was unaware of Ryan's statement until after the state court proceeding was over. Claims preclusion does not apply when a party does not have a "full and fair" opportunity to litigate in the earlier suit. *Taylor v. Stargell*, 128 S. Ct. 1261, 2171, 175 L.Ed. 2d 155, 76 USLW 4453 (2008). Under claim preclusion, a final judgment forecloses successive litigation of "the very same claim." *Id.*

The First Circuit even overlooked its own precedent in holding that claim preclusion applied in this case. Claim preclusion is based upon the idea that the precluded litigant had the opportunity and incentive to fully litigate the claim in an earlier action, so that all matters that were or could have been adjudicated in the earlier action are considered to have been finally settled by the first judgment. *Sonus Networks, Inc. v. Ahmed*, 499 F. 3d 47, 56 (1st Cir. 2007). Giragosian's § 1983 claim was not adjudicated in the state court action and could not have been adjudicated in the state court action. Thus, claim preclusion does not apply to Giragosian's § 1983 claim.

The First Circuit overlooked the facts that Giragosian's state and federal actions were not based on the same claim and did not involve the same issue. In discussing claim preclusion, the First Circuit cited the Restatement (Second) of Judgments § 14, cmt. a (1982) and two

cases stating that when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered which becomes conclusive of the other action. However, Giragosian's state court action did not include his § 1983 action for damages and was therefore different from his claim in federal court. In addition, the issues in the federal action was whether Defendant Ryan had violated Giragosian's constitutional rights by his actions and his statement that he had been trying to run Giragosian out of business for years. These issues were not present in the state court action. Thus, the doctrine of claim preclusion does not apply to Giragosian's § 1983 claim.

A different cause of action is not merely a different theory of recovery, it should differ in theories of recovery, the operative facts and the measure of recovery. *Hogue v. Royce City, Texas*, 939 F. 2d 1249, 1253 (5th Cir. 1991). Giragosian's federal § 1983 claims were a different theory of recovery,

the operative facts were different, including Giragosian's recent learning that Ryan had stated that he had been trying to run Giagosian out of business for years. In addition, the measure of damages was different since the state court action only sought restoration of Giragosian's licenses while the federal Complaint sought damages.

It would be unfair to prevent Giragosian from litigating his § 1983 claim. The First Circuit cited the case of *Tinkham v. Jenny Craig, Inc.*, 699 N.E. 2d 1255 (Mass. App. Ct. 1998). That case stated that application of res judicata "should be addressed from the perspective of fairness and efficient judicial administration since the doctrine of claim preclusion is not applied rigidly where such interests will not be served. Id. at 1258. (*emphasis added*). Giragosian did not file the federal case to engage in claim-splitting, or as an attempt to bring a second action after loss of the other and for this reason

claim preclusion should not be applied. Id. at 1259.

The First Circuit misapprehended a statement of Giragosian's counsel at oral argument, stating that "[a]ppellant also admitted at oral argument that he could have filed his § 1983 claim in state court." This statement was not made at oral argument.[10] There was no opportunity to assert the § 1983 claim in state court. *See* Paragraph 2 above. The discussion at oral argument concerned the availability for relief under the Massachusetts Tort Claims Act, which would only provide limited relief to Giragosian. *See* First Circuit App. 30-31. The only way the Giragosian can assert his § 1983 claim and obtain relief is by his Complaint he filed in federal district court.

Mass. General Laws, c. 140, § 122B governs the sale of ammunition and states that if such license is

[10] Petitioner's counsel had obtained an audio CD of the oral argument before the First Circuit. Petitioner's counsel has reviewed this CD and has confirmed that he did not state that Giragosian could have filed his § 1983 claim in the state court proceeding in the oral argument before the First Circuit.

revoked, the licensee must file a complaint for judicial review in district court within thirty (30) days. Giragosian filed his § 1983 claim in federal court in April 2007. One day later, he filed the complaint for judicial review in state court to meet the thirty (30) day filing requirement. Giragosian had to take this action to preserve his rights and the filing of the state court action was mandatory and not in an effort to split his claims. Also, as shown above, Giragosian definitely did not voluntarily proceed in both forums and is not subject to the consequences of claim preclusion.

The First Circuit also erred when it misapprehended the preclusive effect of the rulings of the state court. In federal court, Giragosian showed that all of Ryan's stated reasons for his forfeiture action were without merit or that Giragosian was only required to correct entries in his books. (First Circuit App. 34-35). The First Circuit incorrectly applied the principle of res judicata to Giragosian's § 1983 claim when this

claim could not have been asserted in the state court action and when the state court judge ignored all of Giragosian's evidence after the judge had indicated that he would rule in Ryan's favor before the hearing began. The First Circuit should not have given preclusive effect to a state court judgment that was such a miscarriage of justice. Any one of Ryan's stated grounds or all of them would warrant some discipline, such as a suspension, but did not justify a revocation or forfeiture of all of Giragosian's licenses, driving Giragosian out of business.

The First Circuit overlooked the primary reason for Giragosian's motion for a temporary restraining order. The First Circuit's decision stated that in May 2007, as the state and federal actions were both proceeding, that Giragosian filed a motion in federal district court for a TRO to enjoin the state court from ruling until the conclusion of the federal case. The First Circuit stated that Giragosian argued that

the state court judge had greeted Defendant Ryan with an excess of cordiality, demonstrating the state court's bias and favoritism toward Defendant Ryan.

However, the First Circuit overlooked the fact that in seeking the TRO, Giragosian also argued that on March 12, 2007, at the judicial review of Ryan's suspensions of Giragosian's licenses, the state court judge told Ryan that he should include all the grounds he advanced for the suspension hearing at the next hearing. At this suspension hearing, Ryan was prepared to advance all his grounds for suspension and to present testimony from the town building inspector, a fire department official and an ATF investigator. When Ryan realized that the court was going to rule in Giragosian's favor, Ryan said that he would be back in court. The state court judge told Ryan to use the same grounds and witnesses at any future hearing. This advice from the judge was a clear signal that the judge would rule in Ryan's favor at any future hearing. Giragosian knew that he could not

obtain a fair hearing from this judge since he had given clear indication of his intent for the future hearing on the forfeiture and revocation of Giragosian's licenses. This was the primary reason for Giragosian's request for a TRO.

The First Circuit misapprehended Giragosian's motive for requesting a TRO in federal court. This request was not in recognition of a potential problem with pursing simultaneous actions in state and federal courts. Giragosian's motivation for the TRO request was to pursue all of his claims in federal court since he knew that the state court judge would rule against him before hearing any evidence in the state license forfeiture case.

II. THE MASSACHUSETTS STATUTORY PROVISIONS DO NOT PROVIDE JURISDICTION TO A MASSACHUSETTS STATE COURT FOR ASSERTING A 42 U.S.C.§ 1983 CLAIM WITH A PETITION FOR JUDICIAL REVIEW OF A LICENSING AUTHORITY'S DECISION TO REVOKE OR FORFEIT FIREARM LICENSES.

The First Circuit held that Giragosian's § 1983 claims in his federal Complaint were barred by the doctrine of res judicata since he could have asserted his § 1983 claims in the state court proceeding challenging the revocation and forfeiture of his licenses.

The Massachusetts firearms statutory provisions are found at Mass. General Laws, c. 140, §§ 121 through 131P. The statutory provisions applicable to Ryan's forfeiture and revocation of Giragosian's licenses are found at Mass. General Laws, c. 140, §§ 122, 122B, 125 and 131.

Mass. General Laws, c. 140, § 122 provides for licenses to sell, rent or lease firearms, rifles, shotguns or machine guns, and to be in business as a gunsmith. However, this statute provides that "any person refused a license under this section may within ten days thereafter apply to the colonel of state police" who may direct the licensing authority to grant said license after a hearing. Since this

section provides a remedy only for refusal of an initial or subsequent application for a license, there is no remedy for revocation or forfeiture of a license under this section. In addition, no remedy for the forfeiture or revocation of this license to sell is provided anywhere in Mass. General Laws, c. 140, §§ 121 through 131P.

It is clear that the Massachusetts Legislature's use of the term "refusal" in Mass. General Laws, c. 140, §122 applies specifically to the licensing authority's refusal to grant a license upon the filing of an application. Clearly, the refusal to grant a license is different and apart from a determination to "suspend, revoke or forfeit" a license. *See*, e.g. Mass. General Laws c.140, § 122B that states "[a]ny person refused a license under this section or once issued a license under this section has had said license suspended or revoked may obtain a judicial review of such refusal, suspension or revocation." Mass. General Laws, c. 140, § 122 is

not ambiguous. Therefore, there is no need to examine its legislative history. *Sperounes v. Farese*, 873 N.E. 2d 239, 243 (Mass. 2007).

Mass. General Laws, c. 140, § 125 provides for suspensions or forfeitures of licenses issued under § 122 and provides for a hearing by the licensing authority, who would be the same person who had suspended or forfeited the license. However, this statute does not provide for any remedy in court and is thus unconstitutional.

The failure of Mass. General Laws, c. 140, §§ 122 and 125 and any other section of the statutory firearm provisions to provide any remedy for the forfeiture or revocation of a license to sell and to do business as a gunsmith is a violation of the Fourteenth Amendment. Therefore, this statute is unconstitutional. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 1025 S. Ct. 1148, 71 L.Ed. 2d 265 (1982), where this Court discussed the constitutional requirements of a pre-deprivation hearing. **A fortiori,** the failure of

a statute to provide any remedy for loss of a license would violate the Fourteenth Amendment. Giragosian raised this valid argument before the First Circuit. *See* Giragosian's Brief at p. 19 and Giragosian's Reply Brief at pp. 2-3. Giragosian also raised this argument at the federal district court level. *See* Doc. 13, ¶13.[11]

28 U.S.C. § 2403(b) may apply and a copy of this Petition will be served on the Massachusetts Attorney General. The First Circuit did not, pursuant to 28 U.S.C. § 2403(b), certify to the Massachusetts Attorney General the fact that the constitutionality of a statute of that state was drawn into question.

Mass. General Laws, c. 140, § 122B governs the sale of ammunition and, as stated above, provides for judicial review for refusals, suspensions or revocations of a license under this section.

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[11] "Doc. ___" refers to pleadings and other document filed in this case at the federal district court level, Chiang v. Ryan, U.S. District Court (Dist. of Mass.), No. 07-cv-10730, and refers to the document number assigned by the Court's electronic filing system

Mass. General Laws, c. 140, § 131 governs licenses to carry and provides for a petition for judicial review within 90 days after receiving notice of a denial, suspension or revocation of a license to carry. *See* § 131(f).

Thus, Mass. General Laws, c. 140, §§ 122B and 131 provide for a petition for judicial review for the licenses issued under those sections. This petition for judicial review must be filed in the (Massachusetts) district court for the city or town in which the applicant filed for such license. These statutes grant the (Massachusetts) district courts specific jurisdiction only for judicial review of the licensing decisions under these sections. These statutes are not general jurisdictional statutes for the Massachusetts state district courts. Neither these statutes nor any other section of Mass. General Laws provide for or allow a license applicant or holder to file any claim for damages or a § 1983 claim in conjunction with a petition for

judicial review of a licensing authority's decision to deny, suspend, revoke or forfeit a license.

The First Circuit did not cite any authority for its holding that Giragosian's § 1983 claims in his federal Complaint were barred by res judicata since he should have asserted the § 1983 claims in the state court proceeding challenging Ryan's revocation and forfeiture of his licenses. This failure by the First Circuit to cite any authority for its holding is explainable since there is no authority for the holding in the Massachusetts statutes or in any Massachusetts case.

The only way that Giragosian can assert his § 1983 claims for damages is by the Complaint he filed in federal district court.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,
PAUL S. GIRAGOSIAN

By Petitioner's Attorney,

DEAN CARNAHAN
LAW OFFICES OF DEAN CARNAHAN
51 Newcomb Street
Arlington, MA 02474
(781) 641-2825

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 10, 2008

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 08-1067

PAUL S. GIRAGOSIAN,

Plaintiff, Appellant,

v.

FREDERICK RYAN and TOWN OF ARLINGTON, MA,

Defendants, Appellees.

Before

TORRUELLA, BALDOCK,* and LIPEZ,
Circuit Judges.

November 10, 2008

BALDOCK, Circuit Judge. Appellant Paul Giragosian owned and operated a gun shop in Arlington, Massachusetts for approximately thirty-one years. In March 2007, Arlington's Chief of Police, Frederick Ryan, revoked and forfeited appellant's licenses to carry and sell firearms. Subsequently, appellant filed a 42 U.S.C.

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* Of the Tenth Circuit, sitting by designation.

§ 1983 suit in federal district court alleging that Ryan and the Town of Arlington violated his rights under the Fourth and Fourteenth Amendments. The district court granted appellees' motion to dismiss.

The issues before us on appeal are (1) whether appellant's § 1983 claims are barred by res judicata, and (2) whether the district court erred by converting appellees' motion to dismiss into a motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm on the basis of claim preclusion.[1]

I.

In addition to selling firearms at his gun shop in Arlington, Massachusetts, appellant conducted training sessions on the use of firearms. In January 2007, while appellant was training a customer to use a handgun, the customer intentionally shot himself in the head, dying as a result of the wound.

On the same day of the incident, the Arlington Police Department conducted an investigation and concluded that appellant was not at fault for the customer's suicide. One day later, appellee Frederick Ryan, Arlington's Chief of Police, suspended appellant's licenses to carry and sell firearms, pursuant to Massachusetts General Laws

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1. Appellant also argues the district court erred in ruling that he failed to state a cause of action under the Fourth and Fourteenth Amendments. We do not address this issue, however, because we hold that appellant's federal action is barred by the doctrine of res judicata.

chapter 140, pending further investigation by the Arlington Police Department and the Middlesex County District Attorney's Office. Ryan also requested that the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigate appellant's business for any potential violations of federal law.

Appellant subsequently challenged the suspension of his licenses in Massachusetts state court. In March 2007, after the Arlington Police Department and the Middlesex District Attorney completed their investigations confirming that appellant was not at fault for the customer's suicide, the Cambridge District Court granted appellant's request to vacate the license suspensions.

Rather than reinstating the licenses, Ryan sent a letter to appellant revoking appellant's licenses to carry firearms and forfeiting his dealer licenses. Ryan's letter listed several reasons for the revocations and forfeitures, including, but not limited to, (1) failure to report stolen firearms, (2) failure to undergo a firearms safety instructor course mandated by the Massachusetts state court following a similar customer suicide in 2002, and (3) various violations of state and federal law found during the ATF investigation requested by Ryan.[2]

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2. The ATF report noted that appellant (1) manufactured ten firearms without a manufacturing license, (2) failed to contact the FBI for a background check prior to the sale of six firearms, (3) failed to report the sale of multiple handguns to three individuals, and (4) failed to properly document the gun shop's and appellant's personal inventory of firearms.

Appendix A

In April 2007, appellant filed a § 1983 action in federal district court alleging Ryan and the Town of Arlington violated his Fourth Amendment right to be free from unreasonable searches and seizures, as well as his Fourteenth Amendment due process rights. Appellant sought reinstatement of his firearms licenses pursuant to Massachusetts law and damages under § 1983. One day later, appellant filed a separate action in state court also seeking reinstatement of his firearms licenses.

In May 2007, as the state and federal actions proceeded simultaneously, appellant filed a motion in federal district court for a temporary restraining order ("TRO") to enjoin the state court from ruling until the conclusion of the federal case. Appellant argued that the state court judge "greeted Defendant Ryan with an excess of cordiality," demonstrating the state court's "bias and favoritism" towards Ryan. The district court denied appellant's motion.

In June 2007 the state court refused reinstatement of appellant's licenses, finding "sufficient grounds to conclude that the decision of [Ryan] in revoking [appellant's] firearms licenses was reasonable and not arbitrary, capricious or an abuse of discretion." *See Giragosian v. Ryan,* No. 07-10730 (Mass. Dist. Ct. June 7, 2007). Following the state-court's ruling, a federal magistrate judge requested supplemental briefing from the parties regarding the state-court judgment's effect on appellees' pending motion to dismiss. Appellees' argued in their supplemental

memorandum that the state-court judgment barred appellant's federal cause of action pursuant to the doctrine of res judicata (both issue and claim preclusion). Appellant argued the federal district court should ignore the state-court judgment because of the state court judge's lack of impartiality and numerous errors of law.

In August 2007, the federal magistrate judge recommended the district court grant appellees' Rule 12(b)(6) motion to dismiss. The magistrate judge ruled (1) issue preclusion barred the federal district court from reexamining whether Ryan's actions were arbitrary, capricious, or an abuse of discretion, (2) the post-deprivation review process available in state court provided appellant adequate process, and (3) qualified immunity shielded Ryan and the Town of Arlington from suit. The district court rejected the magistrate judge's recommendation as to qualified immunity. The district court ruled that the federal magistrate judge relied on information outside the four corners of the complaint in finding qualified immunity. Thus, that issue could only be resolved on a motion for summary judgment. The district court, however, agreed with the magistrate judge's conclusion that appellant failed to "state a cause of action for a violation of due process rights under the Fourteenth Amendment to the Constitution or Fourth Amendment rights." Accordingly, the district court granted appellees' motion to dismiss.

II.

The issues we address on appeal concern the legal sufficiency of appellant's complaint. Our review, therefore, is *de novo*. *See Torromeo v. Town of Fremont*, 438 F.3d 113, 115 (1st Cir.2006). We, like the district court, assume the truth of all well-pled facts and give appellant the benefit of all reasonable inferences drawn therefrom. *See Alvarado Aguilera v. Negrón*, 509 F.3d 50, 52 (1st Cir.2007).

A.

We first consider whether appellant's § 1983 action is barred by the doctrine of res judicata. "Disposition of [a] federal action, once [a] state-court adjudication is complete, [is] governed by preclusion law." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). "Under the full faith and credit statute, 28 U.S.C. § 1738, a judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered." *In re Sonus Networks Inc.*, 499 F.3d 47, 56 (1st Cir.2007) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)). Therefore, we look to Massachusetts law to determine the preclusive effect of the state-court judgment. *Id.*

In Massachusetts, res judicata encompasses both claim preclusion and issue preclusion. *Id.* (citing *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 832

N.E.2d 628, 634 (Mass.2005)). Claim preclusion prevents the relitigation of all claims that a "litigant had the opportunity and incentive to fully litigate . . . in an earlier action." *Id.* Massachusetts evaluates three elements under the doctrine of claim preclusion: "(1) the identity or privity of the parties to the present and prior actions; (2) identity of the cause[s] of action; and (3) a prior final judgment on the merits." *McDonough v. City of Quincy*, 452 F.3d 8, 16 (1st Cir.2006). When assessing the second element of claim preclusion, Massachusetts courts find "[c]auses of action [to be] identical if they 'derive [ ] from the same transaction or series of connected transactions.' " *Id.* (quoting *TLT Const. Corp. v. A. Anthony Tappe & Assoc.*, 48 Mass.App. Ct. 1, 716 N.E.2d 1044, 1052 (Mass.App.Ct. 1999)).

While Massachusetts' case law does not directly address the relevance of the order in which parallel actions are filed, the general rule is that "when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action . . . , regardless of which action was first brought." Restatement (Second) of Judgments § 14, cmt. a (1982); *see also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 838 (7th Cir.1999) ("When the cases proceed in parallel, the first to reach judgment controls the other, through claim preclusion (res judicata)."); *Hogue v. Royse City*, 939 F.2d 1249, 1255 (5th Cir.1991) ("[B]ecause a later-filed claim can be preclusive of an earlier-filed claim, simultaneous filing of multiple claims in different forums based on the same cause of action will not avoid the application of res judicata.").

While parallel litigation may force a court to "recognize the claim- and issue-preclusive effects of a state-court judgment, . . . federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court." *Exxon Mobil*, 544 U.S. at 293, 125 S.Ct. 1517 (internal quotation omitted). Application of res judicata "should be addressed from the perspective of fairness and efficient judicial administration since the doctrine of claim preclusion is not applied rigidly where such interests would not be served." *Tinkham v. Jenny Craig, Inc.*, 45 Mass.App.Ct. 567, 699 N.E.2d 1255, 1258 (Mass.App.Ct.1998).

With such concerns in mind, we proceed to consider the applicability of claim preclusion to the present case.[3] Following the revocations and forfeitures of his various licenses, appellant chose to pursue relief in both state and federal court. Of course, appellant could have pursued all of his claims in a single suit in either forum. In his federal complaint and subsequent memoranda in opposition to appellees' motion to dismiss, appellant requested the federal court exercise pendent jurisdiction over appellant's state claim (the review for reasonableness of the license revocations pursuant to Mass. Gen. Laws ch. 140 § 131(f) and § 122). Appellant

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3. While the district court dismissed appellant's suit on alternate grounds, we focus our discussion on claim preclusion. *See Cook v. Gates*, 528 F.3d 42, 48 (1st Cir.2008) ("In reviewing a Rule 12(b)(6) dismissal, 'we are not wedded to the [district] court's rationale and may affirm an order of dismissal on any basis made apparent from the record.' " (quoting *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir.2006))).

also admitted at oral argument that he could have filed his § 1983 claim in state court. Accordingly, we employ Massachusetts' three part test to determine whether claim preclusion applies. *See McDonough*, 452 F.3d at 16.

All three elements required for claim preclusion under Massachusetts law are easily satisfied here. First, the identity of the parties in the state and federal actions are the same. *See id.* Second, the facts described in both the state and federal complaints are identical, leaving no doubt that the two causes of action "derive[ ] from the same transaction or series of connected transactions." *Id.* In other words, the only transaction at issue in both the state and federal actions is Ryan's revocation and forfeiture of appellant's licenses. Third, prior to the conclusion of the federal proceeding, the state court issued a "final judgment on the merits" when it determined that Ryan reasonably revoked appellant's firearms licenses. *Id.*

Appellant appears to have recognized the potential problem with pursuing simultaneous actions in state and federal court, as he requested a TRO from the district court enjoining a possible state-court judgment. Appellant similarly requested the state court delay its decision until the conclusion of his federal action. At the very least, appellant understood that a federal court would not be able to reinstate his licenses, under state law, if the state court first rendered its own decision.

In support of his TRO, appellant argued he was concerned about bias because of the state court judge's cordial reception of Ryan at the initial state-court proceeding. Such a slight and subjective concern does not warrant disregard for a prior, valid, state-court judgment. We have already rejected the notion that " 'distrust of state courts ... would justify a limitation on the preclusive effect of state judgments.' " *Willhauck, v. Halpin,* 953 F.2d 689, 705 (1st Cir.1991) (quoting *Migra,* 465 U.S. at 84, 104 S.Ct. 892). Instead, "notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources" guide our analysis. *Migra,* 465 U.S. at 84, 104 S.Ct. 892.

Appellant had a full and fair opportunity to litigate his § 1983 claim in state court. *See Mulrain v. Bd. of Selectmen,* 944 F.2d 23, 26 (1st Cir.1991) (federal court dismissed case noting the plaintiff could have raised both his § 1983 and state law claims in state court). Alternatively, appellant could have pursued relief solely in federal court. *See Mancuso v. Kinchla,* 60 Mass.App.Ct. 558, 806 N.E.2d 427, 439 (Mass.App.Ct. 2004) (state court dismissed case noting that both state and federal claims could have been brought in federal court). Permitting appellant to litigate his claims in federal court at this juncture would frustrate the purposes of claim preclusion, which are to "protect 'against the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.' " *Taylor v. Sturgell,* __ U.S. __, 128 S.Ct. 2161, 2171, 171 L.Ed.2d 155 (2008) (quoting

Montana v. United States, 440 U.S. 147, 153-54, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)).

Because appellant voluntarily proceeded in both forums, he is now subject to the consequences of claim preclusion. No unfairness attends this result as "the splitting of [appellant's] claims was voluntary" and appellant was "fully aware of them." *Hayes v. Town of Orleans*, 39 Mass.App.Ct. 682, 660 N.E.2d 383, 387 (Mass.App.Ct.1996). We hold, therefore, that appellant's § 1983 claims against Ryan and the Town of Arlington are barred by the doctrine of res judicata.

B.

Appellant argues the district court improperly converted his motion to dismiss into a motion for summary judgment without providing adequate notice and an opportunity to be heard. When ruling on a Rule 12(b)(6) motion to dismiss, a district court is generally limited to considering "facts and documents that are part of or incorporated into the complaint." *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir.2008). These limitations, however, are not absolute. A district court may also consider "documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir.2003). If the district court relies on other material outside the complaint, not subject to the qualifications listed above, it must convert a motion to dismiss into a motion for summary judgment.

Trans-Spec Truck Serv., 524 F.3d at 321. Before such a conversion occurs, however, parties must have a " 'reasonable opportunity to present all material made pertinent to such a motion.' " *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 31 (1st Cir.2000) (quoting Fed.R.Civ.P. 12(b)). Conversion is improper if it "would come as a 'surprise' or be 'unfair' to the party against whom judgment is rendered." *Id.* (citing *Chaparro-Febus v. International Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 332 (1st Cir.1992)).

Appellant argues the district court improperly considered materials outside of the complaint in ruling on his motion to dismiss. Appellant contends the district court should not have considered, absent a summary judgment hearing, (1) the ATF report outlining appellant's violations of law, and (2) appellant's rebuttal to the Rule 12(b)(6) motion. We need not consider whether the district court properly referenced these documents, however, because we have dismissed appellant's claims on the basis of res judicata. The only materials necessary to support this ruling are the documents pertaining to the state-court judgment against appellant.

A court may consider matters of public record in resolving a Rule 12(b)(6) motion to dismiss. *In re Colonial Mortgage*, 324 F.3d at 15-16. Matters of public record ordinarily include "documents from prior state court adjudications." *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir.2000). Further, use of the state-court judgment is not a "surprise" or otherwise

"unfair." Appellant was aware the federal magistrate judge was considering the state-court documents and he was given an opportunity to present material pertinent to the documents' effect on his federal action. Thus, consideration of the state-court judgment in this case is entirely proper.

For the foregoing reasons, the judgment of the district court is *affirmed.*

APPENDIX B — ORDER DATED NOVEMBER 19, 2008 AND REPORT AND RECOMMENDATION DATED AUGUST 22, 2007 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-10730-PBS

PAUL GIRAGOSIAN,

Plaintiff,

v.

FREDERICK RYAN and TOWN OF ARLINGTON,

Defendants.

ORDER

November 19, 2008

Saris, U.S.D.J.

Plaintiff has objected to the report and recommendation of the United States Magistrate Judge. After review of these objections, I adopt the recommendation to dismiss the action with one caveat.

I agree with the magistrate judge that the complaint does not state a cause of action for a violation of due

process rights under the Fourteenth Amendment to the Constitution or Fourth Amendment rights. However, I do not adopt the recommendation that Mr. Ryan has prevailed on his defense of qualified immunity. Both sides have provided documents and affidavits outside the four corners of the complaint, most significantly the ATF report and the rebuttal from Mr. Giragosian. The magistrate judge has relied on some of those materials outside the four corners of the complaint in ruling on qualified immunity and *Monell* liability. As such, these issues must be handled through a motion for summary judgment, rather than a motion to dismiss.

S/ PATTI B. SARIS
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-CV-10730-PBS

PAUL GIRAGOSIAN,

Plaintiff,

v.

FREDERICK RYAN AND TOWN OF ARLINGTON,

Defendants

REPORT AND RECOMMENDATION ON
DEFENDANTS' RULE 12(b)(6)
MOTION TO DISMISS
(Docket # 5)

Judge Saris referred this case to this Court for a Report and Recommendation with respect to the Defendants' Rule 12(b)(6) Motion to Dismiss. Plaintiff, Paul Girogosian ("Plaintiff"), sues Defendant, Frederick Ryan ("Ryan"), in his individual capacity,[1] alleging Ryan's suspension, revocation and forfeiture of Plaintiff's various firearms licenses[2] were in violation of Plaintiff's

1. Ryan is Arlington's Chief of Police, but he is not being sued in his official capacity.

2. The Plaintiff's following licenses were revoked: one Firearms License; one Machine Gun License; and two Licenses to Carry Firearms licenses. The following were forfeited: License to Sell Firearms; License to Sell Ammunition; License to Gunsmith; and three Dealer's Licenses.

rights pursuant to 42 U.S.C. § 1983, and the Fourth and Fourteenth Amendments of the United States Constitution. Plaintiff also brings suit against Defendant, the Town of Arlington ("Town") for failure to supervise Ryan, demonstrating the Town's custom or policy of deliberate indifference to Plaintiff's rights for which it may be held liable. Plaintiff also seeks attorney's fees pursuant to 42 U.S.C. § 1988.

Factual Background

Plaintiff has owned and operated a gun shop, PSMG, in Arlington, Massachusetts since 1976, approximately thirty-one years. On January 24, 2007, Plaintiff was training a customer to use a handgun in the firing range located in the PSMG basement. After the trainee fired a box of ammunition, Plaintiff went upstairs to get another box to continue target practice. Plaintiff returned, stood to the trainee's left, and resumed the lesson. At some point during the discharge of the next box of ammunition, the trainee pointed the gun to his right temple and shot himself in the head. The bullet went through his headphone, exited his skull on the left, and grazed Plaintiff's cheek. Plaintiff was not seriously hurt, but the trainee was killed.

The Arlington Police Department conducted and completed its investigation of the incident that day and concluded that Plaintiff was not at fault for the trainee's death. The following day, however, Ryan, who is Arlington's Chief of Police, suspended Plaintiff's local licenses to carry on the business of a gunsmith and to

sell firearms pursuant to M.G.L. c. 140 pending further investigation by the Arlington Police Department and the Middlesex District Attorney's Office.

Plaintiff challenged the suspensions in Cambridge District Court on March 12, 2007. By that time, both the Arlington Police Department and the Middlesex District Attorney's Office had completed their investigations and affirmed that Plaintiff was not responsible for the suicide. Accordingly, the Cambridge District Court ordered the Town to reinstate Plaintiff's suspended licenses. Following the suicide, in addition to the above investigations, Ryan requested the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") conduct an investigation of Plaintiff's business for compliance with applicable laws.

The ATF report, completed by Special Intelligence Officer Wayne Bettencourt and submitted to Ryan on March 8, 2007, listed several violations of federal law, some of which also violated Massachusetts state law. Based on the ATF's findings and relevant portions of M.G.L. c. 140, Ryan sent Plaintiff correspondence on March 16, 2007 revoking Plaintiff's license to carry on the business of a gunsmith and forfeiting his dealer's licenses.[3]

As a result of these events, Plaintiff was forced to close his business and has been unable to earn a living since January of this year.[4] He seeks $3,000,000 in damages.

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3. The ATF report and the notices from Ryan are attached to the Defendants' Motion to Dismiss as Exhibits 1 - 3.

4. M.G.L. c. 140 § 125 states that an applicant whose licences have been revoked or forfeited cannot apply for licence reinstatement for a period of one year.

Appendix B

Procedural History and Effect of Cambridge District Court Ruling

Following the loss of his licenses, Plaintiff sought judicial intervention in this Court, as well as in the Cambridge District Court. The Cambridge proceeding was to review Ryan's March 16, 2007 revocation and forfeiture of Plaintiff's gunsmith and dealer's licences, and was filed pursuant to M.G.L. c. 140. The instant case, asserting violations of Plaintiff's above-named constitutional rights, was filed pursuant to 28 U.S.C. §§ 1331 and 1343.[5] Defendants moved for dismissal of this case pursuant to Rule 12(b)(6) on May 7, 2007, and Plaintiff subsequently moved for a Temporary Restraining Order on May 17, 2007 to enjoin the Justices of the Cambridge District Court from conducting their review until this Court issued a decision. The next day, Judge Saris denied Plaintiff's motion and referred the case to this Court for the instant Report and Recommendation.

On June 7, 2007, Judge Severlin Singleton, III affirmed Ryan's legal grounds for revoking and forfeiting Plaintiff's licenses in the Cambridge District Court. His Rulings of Law stated: "Based upon all of

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5. *See Mancuso v. Kinchla*, 60 Mass.App. Ct. 558 (2004), citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724-25 & n. 13, (1966) (explaining, "Federal supplemental, or pendent, jurisdiction describes the doctrine that, in the interest of avoiding piecemeal litigation, allows a plaintiff who properly invokes federal jurisdiction to join sufficiently-related state claims to his federal claims against the defendant.").

the credible evidence and the reasonable inferences therefrom, there is sufficient grounds to conclude that the decision of [Ryan] in revoking [Plaintiff's] firearms licenses was reasonable and not arbitrary, capricious or an abuse of discretion" and that "[Plaintiff] failed to show that [Ryan's] actions .... were arbitrary, capricious or an abuse of discretion."[6]

Because Plaintiff's instant action charges Ryan with arbitrary and capricious abuse of discretion for the same actions, Judge Singleton's decision was submitted for consideration by this Court during the June 27, 2007 Motion Hearing. As instructed, both parties submitted supplemental memoranda on July 11, 2007 stating their positions on the role Judge Singleton's decision should play in the instant proceedings. Defendants attempt to have Plaintiff's entire § 1983 action barred by the broad doctrine of *res judicata*, arguing that Plaintiff could have raised his federal claims before Judge Singleton. Plaintiff, alternatively, attempts to impeach Judge Singleton's ruling, alleging it was "unfair" or "partial".

Plaintiff's argument, however, is immaterial because this Court is not presiding over an appeal of Judge Singleton's decision. In fact, Plaintiff has sought a writ of certiorari in the Middlesex Superior Court to address his complaints about Judge Singleton's alleged misconduct and errors. Defendants' argument, on the other hand, is overreaching. This Court, therefore, finds

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6. Judge Singleton's complete decision is attached as Exhibit A to Defendants' July 11, 2007 Memorandum.

a middle ground, and applies the narrower doctrine of issue preclusion in its consideration of Judge Singleton's ruling.[7]

Noting that the Full Faith and Credit clause has been part of the United States Constitution in some form or another since 1790, the Supreme Court, in *San Remo Hotel, L.P. v. City & County of San Francisco, California, et al.*, 545 U.S. 323 (2005), stated: "The general rule implemented by the full faith and credit statute - that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction - predates the Republic." *Id.* at 336. More specifically, the Court explained in *Allen:* "Under collateral estoppel, once a court had decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* at 94.

Plaintiff's claim that Ryan's revocation and forfeiture of his licenses was an arbitrary and capricious abuse of discretion was fully considered in the Cambridge District Court before Judge Singleton. Judge Singleton explicitly ruled on that issue after hearing all the facts. The parties and the "common nucleus of operative fact" in that forum were, for all intents and purposes, identical to those before this

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7. *Allen v. McCurry*, 449 U.S. 90, n.5 (1980) (explaining, "The Restatement of Judgments now speaks of collateral estoppel as "issue preclusion.").

Court regarding the Plaintiff's arbitrary and capricious abuse of discretion claim. Therefore, the issues surrounding the facts of Plaintiff's arbitrary and capricious abuse of discretion claim against Ryan are precluded, and this Court will not reexamine the factual basis for that claim. Judge Singleton's rulings are accepted and applied in review of Plaintiff's federal § 1983 claims, which will be discussed below.

Legal Principles and Recommendations

In response to Count I, a 42 U.S.C. § 1983 claim, Ryan raises the defense of qualified immunity. This issue is addressed at the outset, in accordance with *Saucier v. Katz*, 533 U.S. 194 (2001). There, the Supreme Court explained that when qualified immunity is raised, "a ruling on that issue should be made early in the proceedings" because it is "an *immunity from suit* rather than a mere defense to liability." *Id.* at 200 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (emphasis in original). Because the process of examining Ryan's entitlement to qualified immunity necessarily requires consideration of the merits of Plaintiff's claims, this Court concurrently arrives at its conclusion regarding Defendants' Rule 12(b)(6) motion to dismiss.

In their memoranda, both parties rely on the *Saucier* standard for determining whether qualified immunity applies. The threshold question asks, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. Assuming a

violation, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.* at 201. This inquiry should clarify "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). With this chronology established, the Court offers the following guidance; "Our instruction to the district courts . . . to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important." *Id.* at 207. Plaintiff's constitutional claims are considered in turn.

The first constitutional violation Plaintiff alleges is denial of his Fourteenth Amendment right to due process.[8] Plaintiff makes two due process arguments, one based on a lack of process, and the other on deficient process. Regarding the former, he avers Ryan issued the original suspension in January without a pre-deprivation hearing. For the latter, while Plaintiff was afforded a hearing following the March revocation and forfeiture notices, he avers that he was not "fairly judged" at that proceeding.[9] However, as will be

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8. Plaintiff's other § 1983 claim is based on his alleged deprivation of his Fourth Amendment rights. This will be discussed below.

9. Judge Singleton presided over Plaintiff's initial March 12, 2007 hearing and his subsequent writ of certiorari reviewing the revocation and forfeiture of Plaintiff's licences in the

(Cont'd)

explained below, a due process claim is only appropriate when no appeal or "post-deprivation" process exists following property deprivation.

The initial question is whether the state process provides Plaintiff with an adequate remedy. The Court of Appeals for the Fourth Circuit outlines the threshold requirements for making procedural due process claims: "To establish a violation of procedural due process, plaintiffs must show that (1) they had property or a property interest (2) of which the defendant deprived them (3) without due process of law" *Sunrise Corp. v. Myrtle Beach*, 420 F.3d 322, 328 (2005), (citing *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 826 (4th Cir. 1995)). In the instant case, the third element is the only one at issue as the first two are uncontested.

In the § 1983 context, the First Circuit has defined procedural due process according to the "*Parratt-Hudson* doctrine". *Parratt v. Taylor*, 451 U.S. 527 (1981) (establishing that *negligent* deprivation of property by a state official does not equal a Fourteenth Amendment Due Process violation where a post-deprivation procedure exists); *Hudson v. Palmer*, 468 U.S. 517 (1984)

(Cont'd)

Cambridge District Court. In both his original Complaint and supplemental memoranda, Plaintiff alleges Judge Singleton was "excessively cordial" with Ryan, that he was swayed to find for Ryan by the press, and that he ignored evidence put forth by Plaintiff. Plaintiff argues that Judge Singleton was not impartial, that he made prejudicial errors of law, and that he should have recused himself as Plaintiff requested.

(extending *Parratt* to hold that *intentional* deprivation of property by state officials also does not equal a Fourteenth Amendment Due Process violation where a post-deprivation process exists). Clarifying whether pre-deprivation hearings, post-deprivation hearings, or both are required, the First Circuit has relied on the *Parratt-Hudson* doctrine to state: "When a deprivation of a property interest is occasioned by random and unauthorized conduct by state officials, . . . the [Supreme] Court has repeatedly emphasized that the due process inquiry is limited to the issue of the adequacy of the post-deprivation remedies provided by the state." *O'Neill v. Baker*, 210 F.3d 41, 49 (1st Cir. 2000). In support of this conclusion, the Supreme Court has reasoned, "when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation [sic] procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson*, 468 U.S. 517 at 533.

Application of these precedents forecloses Plaintiff's due process arguments. First, as Defendants' motion illuminates, M.G.L. c. 140 includes appeal procedures, or a post-deprivation process.[10] Even if Ryan's actions

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10. M.G.L. c. 140 § 122 contains the licensing procedures governing the sale of firearms and carrying on the business of a gunsmith: "Any person refused a license under this section may within ten days thereafter apply to the colonel of state police for such license, who may direct that said licensing authorities grant said license, if, after a hearing, he is satisfied

(Cont'd)

were exactly as Plaintiff alleged, "an unauthorized and intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation [sic] remedy for the loss is available." *Hudson*, 468 U.S. 517 at 533.[11]

(Cont'd)
there were no reasonable grounds for the refusal to grant such license and that the applicant was not barred by the provisions of law from holding such a license."

M.G.L. 140, § 122B governs licencing to sell ammunition: "Any person refused a license under this section or once issued a license under this section has had said license suspended or revoked may obtain a judicial review of such refusal, suspension or revocation by filing within thirty days of such refusal, suspension or revocation a petition for review thereof in the district court having jurisdiction in the city or town in which the applicant filed for such license, and a justice of said court, after a hearing, may direct that a license be issued the applicant if satisfied there was no reasonable ground for refusing such license and that the applicant was not prohibited by law from holding same."

M.G.L. 140, § 131 governs the issuance and revocation of licenses to carry firearms and licences to possess firearms. In relevant part, it provides: "any holder aggrieved . . . may . . . file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for, or was issued, such license."

11. *Hudson* reached this conclusion by extending the Court's earlier decision in *Parratt*, which held "the Due Process

(Cont'd)

Further, Plaintiff does not claim that the lack of a pre-deprivation hearing makes the law unconstitutional on its face.[12] Rather, Plaintiff essentially argues that Ryan's actions, independent of the statutory law, were "random and unauthorized" abuses of discretion. Such actions, however, do not violate due process according to the *Parratt-Hudson* doctrine. Plaintiff would have to challenge the law's content to state a § 1983 claim here, which he does not do.[13]

(Cont'd)

Clause of the Fourteenth Amendment is not violated when a state employee *negligently* deprives an individual of property, provided that the state makes available a meaningful postdeprivation [sic] remedy." *Hudson*, 468 U.S. 517 at 531 (citing *Parratt*, 451 U.S. 527 (1981)) (emphasis added). Therefore, both intentional and unintentional deprivations only require post-deprivation remedies to be adequate for due process purposes.

12. M.G.L. c. 140 §§ 122, 122B and 131, the state laws that authorized Ryan's actions, specifically provide for post-deprivation appeals but do not include pre-deprivation provisions.

13. Plaintiff invokes *Logan v. Zimmerman*, 455 U.S. 422 (1982) for the proposition that "procedural requirements are a matter of federal law", however, Plaintiff's attempt misconstrues *Logan*. *Logan* analyzed a situation where enforcement of codified law would work to deny a plaintiff of due process, and thus was a facial challenge of the statute in question. Plaintiff's argument in the instant case is distinguishable from that scenario, as he does not raise a facial challenge, and accordingly, *Parratt - Hudson* controls.

The closest Plaintiff comes to making a facial challenge to M.G.L. c. 140 is his argument that because the state process does not contain a provision for damages, an alternative remedy must be left open for financial recovery. This reasoning, however, is also foreclosed by *Hudson*. Because a party "might not be able to recover under [state] remedies the full amount which he might receive in a § 1983 action is not, as we have said, determinative of the adequacy of the state remedies." *Hudson*, 468 U.S. 517 at 535 (citing *Parratt*, 451 U.S. at 544). Accordingly, the first prong of Plaintiff's Fourteenth Amendment due process claim under § 1983, lack of due process, is legally unsupported.

Plaintiff's other due process argument states that the process was deficient because he was not "fairly judged" by Judge Singleton in the Cambridge District Court.[14] Analyzing due process claims of this nature, the Fourth Circuit explained: "Plaintiffs claim that their due process rights were violated because the hearings they received were unfair, *Even if true*, which we do not decide, this does not change the fact that plaintiffs received . . . levels of review, in each of which they were permitted to present their side of the controversy . . . we review the state process as a whole." *Sunrise Corp.*, 420 F.3d at 328 (emphasis added). Taking Plaintiff's statement at face value, therefore, would not constitute a due process claim on the facts before this Court

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14. *See* Plaintiff's affidavit, supplemental memorandum and memorandum in opposition to dismissal for a full account of his impressions of Judge Singleton's bias.

because he received two post-deprivation hearings under M.G.L. c. 140.[15] To the contrary, "the very extent of review is an indication of the existence of procedural due process, rather than its absence." *Id.*[16]

On the above grounds, the answer to the question "do the facts alleged show the officer's conduct violated a constitutional right?", must be no. *Saucier*, 533 U.S. at 201. Because Plaintiff cannot meet the first prong of the test, Ryan is entitled to qualified immunity on Plaintiff's Fourteenth Amendment due process claim and, thus, this conclusion concurrently states that Plaintiff has failed to state a claim for which relief can be granted with respect to his due process claim.

The Fourth Amendment claim, alleging Ryan's actions violated Plaintiff's right to be secure against unreasonable searches and seizures of property, is the only remaining constitutional right proffered by Plaintiff if Ryan is entitled to immunity from suit regarding the Fourteenth Amendment claim. Again examining the legal grounds for averring this constitutional claim on the facts present, this Court finds Plaintiff's Fourth Amendment argument is also legally unsound.

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15. Moreover, such a claim is not a procedural due process failure; a complaint about the process itself would be a substantive due process claim rather than a procedural one.

16. Plaintiff appealed his suspension, as well as his revocation and forfeiture, in the Cambridge District Court. He is also currently pursuing a writ of certiorari in the Middlesex Superior Court to review the latter.

Plaintiff challenges Ryan's motivations and legal grounds for issuing the license revocations and forfeitures. He states that based on the infractions cited, the punishment was "unreasonable"; that the order reinstating his suspended licences demonstrated Plaintiff's suitability to hold said licences; and that Ryan's actions were arbitrary and capricious abuses of discretion. As explained above, the latter argument will not be addressed by this Court.

Neither party directs the Court to precedent in analyzing § 1983 claims in the Fourth Amendment search and seizure context. *Saucier*, discussing qualified immunity and the Fourth Amendment's prohibition of excessive force in arrests, stated generally: "qualified immunity applie[s] in the Fourth Amendment context just as it would for any other claim of official misconduct." *Saucier*, 533 U.S. at 203 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)). Proceeding, the issue is whether it would be reasonable for Ryan to know that his revocation and forfeiture of Plaintiffs licenses violated Plaintiff's rights.

The Court notes that Ryan's own police department and the Middlesex District Attorney's office exculpated Plaintiff from wrongdoing related to the January 2007 suicide. However, the ATF investigation provided Ryan with separate grounds to take adverse action against Plaintiff, as Arlington's Chief of Police. The ATF officer discovered Plaintiff "manufactured 10 firearms without a manufacturers' license"; "failed to contact FBI NICS prior to the transfer of 6 firearms to 6 individuals";

"failed to report 3 multiple handgun sales to 3 individuals"; "failed to properly log in 29 firearms and log out 149 firearms in the A&D book and failed to properly log in his personal firearms in the Personal Firearms Collection Book." Further, Plaintiff was cited for failure to report one or more stolen firearms; leaving a trainee unattended in a firing range (the January 2007 decedent); and failure to truthfully complete an application for licence renewal. Consideration of this information resulted in Ryan's revocation and forfeiture of Plaintiff's licences for being an unsuitable license-holder under M.G.L. c. 140, thus he issued the revocations and forfeitures.

Based on the violations cited by the ATF officer and Ryan - none of which Plaintiff disputes[17] - there is not enough alleged in the Complaint to support a conclusion that Ryan's actions were not reasonable. Examining Plaintiff's allegations further would require delving into his arbitrary and capricious argument, which, again, is precluded from consideration by this Court since Judge Singleton explicitly ruled that said claim was without merit. Accordingly, this Court FINDS that Ryan is entitled to qualified immunity from Plaintiff's Fourth and Fourteenth Amendment claims, and therefore RECOMMENDS that Count I of the Complaint, 42 U.S.C. § 1983 against Frederick Ryan, should be DISMISSED.

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17. Plaintiff offers explanations, but does not deny any of the violations cited.

Appendix B

In his remaining claim, Plaintiff alleges that the Town has a custom or policy[18] of allowing Ryan unchecked authority, amounting to the Town's "deliberate indifference" to Plaintiff's constitutional rights.[19] *Manarite v. City of Springfield*, 957 F.2d 953 (1st Cir. 1972). The Town responds that Plaintiff cannot make a case for municipal liability on the facts. Further, the Town proceeds on the premise that the charges against Ryan will be dismissed and restates the argument that Ryan's actions were well within the acceptable bounds of his discretionary functions as Police Chief, and therefore the Town is not liable for any wrongdoing related to the supervision of Ryan.

Both parties rely on *Monell v. Department of Social Services*, 436 U.S. 658 (1978), to establish the test for municipal liability. "[A] municipality may be liable under § 1983 only if there is a showing that a 'policy or custom' of the municipality caused a constitutional tort." *Britton v. Maloney*, 901 F. Supp. 444, 449 (1995) (quoting *Monell*, 436 U.S. at 694). The facts of the case and the clarity of

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18. Although Plaintiff recognizes the distinct definitions of "custom" and "policy", he uses the terms together throughout his papers.

19. Plaintiff claims that the recent episode was not the first contentious encounter between Ryan and Plaintiff. Ryan attempted to bring criminal charges against Plaintiff in 2002 following a different suicide at Plaintiff's business. The application was denied by the state clerk magistrate, however, because Ryan's allegations relied on an earlier version of state law that had since changed - Plaintiff's possession of a particular type of gun was not illegal under the controlling law.

the causal connection between the policy or custom and the violation are two factors that inform whether municipal liability may be found. *See Britton*, 901 F. Supp. 444; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The municipality must be implicated in the violation with some directness - *respondeat superior* does not apply indiscriminately in § 1983 cases to hold municipalities responsible for the actions of its officials or employees. *Monell*, 436 U.S. at 694.

Plaintiff argues that this custom became, for § 1983 purposes, an unofficial policy for which the Town may be held liable for liability to attach to a custom, which Plaintiff's theory presents, it must be "so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet [do] nothing to end the practice." *Britton*, 901 F. Supp. at 450 (quoting *Bordanaro v. MacLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989)). Invoking *Briton*, Plaintiff asks this Court to leap frog from a policy argument to a custom argument to a tolerance one: "liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it." *Britton*, 901 F. Supp. at 450.

Although he constructs a theory to hold the Town liable based on the municipal liability thresholds, he has averred no facts in support of the conclusion that the Town inadequately supervised Ryan. "Municipal liability attaches where - and only where - a deliberate choice to follow a course of action is made from among various

alternatives by the official or officials responsible for establishing final policy with respect to the subject in question." *Manarite*, 957 F.2d at 958 (citing *Pembaur*, 475 U.S. at 486). Plaintiff does not name a policy, custom or official responsible for the alleged propagation of indifference to his rights. Plaintiff does not meet the standards set forth to hold the Town liable for Ryan's actions. Therefore, this RECOMMENDS that the Town's Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted should be ALLOWED.

Conclusion

Each of Plaintiff s allegations have been examined and all facts construed in his favor. Based on the above analysis, however, Plaintiff's claims are all foreclosed by the principles of qualified immunity or failure to state a claim for which relief can be granted. Accordingly, this Court RECOMMENDS that this case be DISMISSED.

SO ORDERED.

August 22, 2007 — *Date*

/s/ Joyce London Alexander — United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED DECEMBER 3, 2008

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 08-1067

PAUL S. GIRAGOSIAN

Plaintiff - Appellant

v.

FREDERICK RYAN; TOWN OF ARLINGTON, MA

Defendants - Appellees

Before

Torruella, Baldock*, and Lipez,
Circuit Judges.

ORDER OF COURT

Entered: December 3, 2008

Appellant Paul S. Giragosian's Petition for Rehearing is *denied.*

By the Court:
/s/ Richard Cushing Donovan, Clerk

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* Of the Tenth Circuit, sitting by designation.

APPENDIX D — STATUTES INVOLVED

Mass. Gen. Laws, Chapter 140, Section 122 – Licenses for Sale

The chief of police . . . may grant a License . . . to sell, rent or lease Firearms, rifles, shotguns, or machine guns, or to be in business as a gunsmith. . . . Any person refused a license under this section may . . . apply to the colonel of state police for such license, who may direct the licensing authorities to grant such license, if, after a hearing, he is satisfied there were no reasonable grounds for the refusal to grant such license. . . .

Mass. Gen. Laws, Chapter 140, Section 122B – Sale of Ammunition

. . . The chief of police . . . may . . . grant a license . . . to sell ammunition. . . . Any person refused under this section or once issued a license under this section has had such license suspended or revoked may obtain judicial review of such refusal, suspension or revocation by filing within thirty days of such refusal, suspension or revocation a petition for review thereof in the district court having jurisdiction in the city or town in which the applicant filed for such license. . . .

Appendix D

Mass. Gen. Laws, Chapter 140, Section 125 – Forfeiture or Suspension of Licenses

The officials authorized to issue a license under section one hundred and twenty-two, after due notice to the licensee and reasonable opportunity for him to be heard, may declare his license forfeited or may suspend his license for such period of time as they may deem proper. . . .

Mass. Gen. Laws, Chapter 140, Section 131 – Licenses to Carry Firearms

A Class A license shall entitled a holder thereof to purchase, rent, lease, borrow, possess and carry firearms . . . for all lawful purposes, subject to such restrictions . . . as the licensing authority deems proper . . . Any person . . . may submit to such licensing authority . . . an application for a license to carry firearms. . . . Any applicant or holder aggrieved by a denial, revocation or suspension of a license . . . may with 90 days after receiving notice of such denial, revocation or suspension . . . file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for, or was issued, such license. . . .